



2005

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72 U. Chi. L. Rev. 881-918 (2005).

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Torture's Truth

Louis Michael Seidman†

INTRODUCTION: WHY CAN'T WE TALK ABOUT TORTURE?

No one wants to talk about torture.

Throughout most of the three years between the attack on the World Trade Center and the release of the Abu Ghraib photographs, it should have been apparent to any careful reader of American media that the United States was complicit in the use of physical coercion to obtain information.¹ But, perhaps in part because of the extraordinary reaction to the September 11 attacks, there was no sustained public debate about the matter.²

Then came the photographs that could not be ignored.³ A brief uproar followed, complete with the leaks, congressional hearings, pompous denunciations, outraged finger-pointing, and media frenzy that are the defining characteristics of Washington scandal. Ironically, though, the events at Abu Ghraib—as grisly as they were—seem to have been only marginally related to the much broader, systematic use of physical pressure as part of the interrogation process. In this sense, the scandal turned out to be yet another way of avoiding the subject.

† Professor of Law, Georgetown University Law Center. Many people helped me to think through and write about this problem. I am grateful to participants at the University of Provence Colloquium on Confessions, the Georgetown University Law Center Summer Workshop Series, the Princeton University conference on the law of torture, and the New York University Law School Criminal Law Discussion Group, where I presented versions of this Article. I received especially useful comments from Lama Abu-Odeh, David Bernstein, Steven Goldberg, Vicki Jackson, Emma Jordan, David Luban, Stephen Master, Julie O'Sullivan, Philip Schrag, Warren Schwartz, David Skeel, Marc Spindelman, Mark Tushnet, and Robin West. I could not have written this Article without the help of two extraordinarily energetic and thoughtful research assistants: Graeme Smyth and Brian Shaughnessy. Research for this Article was supported by a Summer Research Grant from the Georgetown University Law Center.

¹ See Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban on Torture in the Wake of September 11*, 81 Tex L Rev 2013, 2020–28 (2003) (citing media reports of several questionable American practices, including the extradition of suspected terrorists to countries known to practice torture).

² See, for example, Todd Gitlin, *The Great Media Breakdown: The Press Admits It Fell for the Administration's Line on Weapons of Mass Destruction*, Mother Jones 56 (Nov 1, 2004) ("Bush received an even broader pass after September 11. At least until American bodies piled up in Iraq and the Abu Ghraib revelations cracked through, journalists clearly feared that seeming to cast discredit on the commander in chief would smack of insufficient patriotism.").

³ See Seymour M. Hersh, *Torture at Abu Ghraib*, New Yorker 42 (May 10, 2004) (publicizing the torture that occurred at Abu Ghraib by exposing the photographs taken there).

It left untouched questions about interrogation practices in Guantanamo, in Afghanistan, in various countries where the United States government has deported terror suspects, and in a variety of “undisclosed locations.”

In any event, within a few weeks, media attention lapsed. To be sure, there have been angry calls for resignations, some embarrassment for administration officials, and a few convictions of low-level figures in the scandal.⁴ But rhetorical catharsis and saddling a few individuals with the blame for systemic abuse have turned out to serve primarily as a way of “putting the problem behind us.” At this writing, at least, no one of any importance has lost his job. There has been no comprehensive reform. All that remains is the faint afterglow that marks the dying phase of such scandals—the official reports, scattered prosecutions, and buried follow-up stories.

This inability to maintain sustained focus on torture would come as no surprise to those who study the practice. Writing before the World Trade Center disaster, John Conroy provided a useful typology of the “stages of denial” that generally accompany revelation of torture.⁵ Many of the stages, including the minimization of abuse, the disparagement of victims, the claim that torture is no longer occurring, and the singling out of a “few bad apples” to take the blame, will be familiar to followers of the Abu Ghraib imbroglio.

The fact that these techniques work suggests that the general public treats torture the way that some married couples treat a long-standing extramarital affair—as a distasteful necessity that is acceptable so long as everyone is discreet, but that must be denounced if made explicit. One might suppose that legal academics and philosophers would take a different stance. It is, after all, their job to make explicit things that otherwise would escape discussion. In fact, though, it turns out that many academics also have little desire to talk seriously about torture.

To be sure, in recent years, there has been an outpouring of philosophical and legal debate about torture. It turns out, though, that some of those who have written most extensively and eloquently on the subject have evaded the hardest issues. Of course, I do not mean to claim that none of this debate is worthwhile. There has been thought-

⁴ See T.R. Reid, *Guard Convicted in the First Trial from Abu Ghraib; Graner Faces 15 Years for Abusing Iraqis*, Wash Post A1 (Jan 15, 2005) (describing the conviction of Charles A. Graner, Jr. on five counts of assault, maltreatment, and conspiracy).

⁵ John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* 243–47 (Knopf 2000) (identifying nine stages of response to torture based largely on the British experience following revelations of that nation’s torture of people wrongly suspected of IRA ties).

ful and disturbing work done on the subject.⁶ Even some of the best work, however, is marked by a palpable sense of unease about really coming to grips with the problem.⁷

For analytic purposes, we might divide these evasions between those produced by High-Minded Moralists and those produced by Sophisticated Machiavellians. Moralists present themselves as determined to abolish torture,⁸ but in fact they seem at least partially motivated by the desire to make a symbolic statement about its absolute unacceptability, whether or not that statement actually leads to less real-world suffering. Often, achieving this goal requires Moralists to limit their field of vision. Some Moralists have hedged in the prohibition with a definition that substantially limits its scope.⁹ Virtually all Moralists focus on the human suffering imposed by the use of certain techniques, but are unwilling to broaden their concern to suffering that might be caused by the failure to use them. Instead, many of them adopt as an article of faith the proposition that these techniques are never useful.¹⁰

A second form of willful blindness involves a readiness to substitute pious denunciation for practical measures that might limit the

⁶ Much of the best work is collected in Sanford Levinson, ed, *Torture: A Collection* (Oxford 2004).

⁷ See, for example, Slavoj Žižek, *Welcome to the Desert of the Real!* 102–04 (Verso 2002) (“[E]ssays . . . which do not advocate torture outright, [but] simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture.”). I was made aware of Žižek’s argument by Levinson, 81 Tex L Rev at 2042–43 (cited in note 1) (characterizing Žižek as advocating rules that are facially but not practically absolute).

⁸ See, for example, Philip B. Heymann, *Torture Should Not Be Authorized*, Boston Globe A15 (Feb 16, 2002) (claiming that even “off the books” torture is unacceptable, though “[p]unches may be thrown”); Christopher W. Tindale, *The Logic of Torture: A Critical Examination*, 22 Soc Theory & Prac 349, 356–70 (1996) (denying that any possible circumstances could justify torture); Henry Shue, *Torture*, 7 Phil & Pub Aff 124, 125 (1978) (arguing that “a comparison between some types of killing in combat and some types of torture actually provides an insight into an important respect in which much torture is morally worse”).

⁹ Consider Levinson, 81 Tex L Rev at 2038 (cited in note 1) (“[E]very lawyer knows that if a given activity *X* is prohibited, then the task is to define the act of one’s client as *X* – *a*, where *a* is something the lack of which means, arguably, that one is not doing *X* at all inasmuch as *a* is a necessary condition for something being described as *X*.”).

For an especially egregious example of this technique, see U.S. Department of Justice, Office of Legal Counsel, *Memorandum for Alberto R. Gonzales, Counsel to the President: Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A* at 2–27 (Aug 1, 2002), online at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (visited May 3, 2005) (defining narrowly the scope of domestic and international bans on torture). See also Part I (discussing the limited definition of torture in the Convention Against Torture and Other Cruel and Degrading Treatment).

¹⁰ See Conroy, *Unspeakable Acts* at 112–14 (cited in note 5) (noting that despite isolated examples, like the French in Algeria, torture generally produces information of minimal, if any, value); Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* 28–29 (Oxford 1985) (arguing that information is not the real motive for torture).

amount and severity of torture. What the Moralists are really up to is perhaps best revealed by their outraged reaction to Alan Dershowitz's iconoclastic proposal to regularize and publicize torture through the use of "torture warrants."¹¹ Dershowitz argues that the public and official authorization of torture through established procedures would produce less, rather than more, of it.¹² Of course, this assertion is an empirical prediction that may be wrong,¹³ but good faith empirical disagreement alone hardly explains the level of anger generated by his

¹¹ See Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* ch 4 (Yale 2002) (arguing that the use of torture warrants would decrease the amount of physical violence directed against suspects, better protect the rights of the suspect, and bring the debate on torture out into the open). For an example of the High-Minded Moralism reaction, see Heymann, *Torture Should Not Be Authorized*, Boston Globe at A15 (cited in note 8) (rejecting Dershowitz's claim that judges will meaningfully reduce instances of torture). For the negative reaction of a Sophisticated Machiavellian, see Oren Gross, *Are Torture Warrants Warranted?: Pragmatic Absolutism and Official Disobedience*, 88 Minn L Rev 1481, 1519-53 (2004) (claiming that extralegal torture with ex post public justification is preferable to ex ante approval by the judiciary because it avoids decisionmaking "in the heat of battle" and problems of precedent).

¹² Dershowitz, *Why Terrorism Works* at 156-53 (cited in note 11) ("I believe, though I certainly cannot prove, that a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects").

¹³ Elaine Scarry, for example, argues that it almost certainly is wrong. She points to our experience with the court charged with issuing warrants under the Foreign Intelligence Surveillance Act (FISA), which has declined only one requested warrant in twenty-five years. See Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in Levinson, ed., *Torture* 281, 286 (cited in note 6), citing David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 68 (New Press 2003) and Dan Eggen and Susan Schmidt, *Secret Court Rebuffs Ashcroft*, Wash Post A1 (Aug 23, 2002). Moreover, she asserts, as a logical matter, warrants are highly unlikely to reduce the incidence of torture. Either the proposed "torture court" will grant a warrant or refuse one. To the extent that warrants are granted, torture that is today illegal will be made legal. Obviously, the net effect is an increase, rather than a decrease, in the incidence of torture. Suppose, though, that a large number of warrants are denied. There is no reason to believe, she asserts, that people who are willing to disobey our current absolute prohibition on torture will suddenly obey court orders that prohibit the practice without an adequate showing of cause. Scarry, *Five Errors in the Reasoning of Alan Dershowitz* at 286-87. Thus, neither the granting nor the denial of torture warrants will lead to a decline in torture.

These are forceful arguments, and Scarry may be right about both of them. They are not dispositive, however. With respect to the record of the FISA court, she ignores the possibility that a stable equilibrium has developed under which the Justice Department does not bother to request warrants when it knows that FISA will reject the request. See Philip Shenon, *Senate Report on Pre-9/11 Failures Tells of Bungling F.B.I.*, NY Times A14 (Aug 28, 2002) (reporting that FBI supervisors declined to permit an application for a warrant from the FISA court because they believed the legal standard for a warrant was not satisfied). See also *United States v. Leon*, 468 US 897, 955 (1984) (Brennan dissenting) (arguing that the warrant requirement and exclusionary rule give police officers incentive not to seek warrants with inadequate affidavits). Scarry's second argument ignores the porous nature of the current torture prohibition. It is at least possible that the torture ban is like the ban on the sale of alcohol during Prohibition—unenforceable precisely because violations are so pervasive. If some of the conduct is legalized, it may be easier to maintain a norm of compliance for the remaining conduct that is not. For a classic argument along these lines, see Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 Annals Am Acad Polit & Soc Sci 157 (1967).

proposal. That anger suggests that many torture opponents find his proposal abhorrent even if he is right. Apparently, these Moralists are unwilling to trade the symbolic satisfaction produced by the legal prohibition of torture for a reduction in the incidence of the practice itself.¹⁴

Perhaps this stance can be explained on the ground that some of these Moralists are really Sophisticated Machiavellians. Machiavellians purport to understand what the Moralists ignore—the possibility that torture might sometimes work and might sometimes produce benefits that make it worth the price. One might suppose, then, that Machiavellians would favor a candid and serious engagement with the advantages and disadvantages of torture. In fact, though, many Machiavellians, like many Moralists, want no such thing. For them, public acknowledgment and debate about torture will lead to either too much or too little of it—too much because torture will then be legitimated; too little because public revulsion will get in the way of dirty work that has to be done. The first concern is expressed by scholars who claim that the law should publicly condemn but privately tolerate torture.¹⁵ The second is illustrated by the actions of the Bush administration, which secretly endorsed what might charitably be called “unconventional interrogation techniques,” but then rushed to disavow the endorsement when it became publicly known.¹⁶

¹⁴ For example, Scarry objects to Dershowitz's proposal in part because, if torture is really necessary, law enforcement officers will engage in the practice in the teeth of a legal prohibition. Dershowitz “assumes a cowardly population incapable of acting without prior guarantees of immunity,” she complains. Scarry, *Five Errors in the Reasoning of Alan Dershowitz* at 283–84 (cited in note 13). This observation counts against Dershowitz's proposal only if one thinks that it is legal permission to torture, rather than the torture itself, that is objectionable. See also Zizek, *Desert of the Real!* at 103 (cited in note 7):

OK, we can well imagine that in a specific situation, confronted with the proverbial “prisoner who knows” and whose words can save thousands, we would resort to torture—even (or, rather, precisely) in such a case, however, it is absolutely crucial that we do *not* elevate this desperate choice into a universal principle; following the unavoidable brutal urgency of the moment, we should simply do it. Only in this way, in the very inability or prohibition to elevate what we had to do into a universal principle, do we retain the sense of guilt, the awareness of the inadmissibility of what we have done.

¹⁵ For examples of Machiavellian arguments along these lines, see Gross, 88 Minn L Rev at 1487 (cited in note 11) (advocating an absolute ban on torture while allowing official disregard of that ban in extreme cases); Sanford H. Kadish, *Torture, the State and the Individual*, 23 Israel L Rev 345 (1989) (arguing for an absolute official ban on torture by the state while admitting that it may be morally permissible for an individual to torture).

¹⁶ See Mike Allen and Susan Schmidt, *White House Disavows Justice*, Wash Post A3 (June 27, 2004) (“President Bush's aides disavowed an internal Justice Department opinion that torturing terrorism suspects might be legally defensible, saying it had created the false impression that the government was claiming authority to use interrogation techniques barred by international law.”).

The upshot of all this is that, although they are divided among themselves, neither the Moralists nor the Machiavellians really want to talk about torture—a reticence that is reinforced by a public that does not really want to listen.

In this Article, I argue that the obstacles to having a serious conversation about torture are exacerbated by a truth that torture teaches us—a truth that we cannot afford fully to know and, so, frantically try to obscure. Law is about respect for commitments and limits, and the existence of torture challenges the possibility of such respect. If we are prepared to torture, then, it would seem, we are prepared to do anything, and the restraint that law purports to impose upon us is a fraud. Torture's truth, then, is that all of our promises to ourselves and to others are ultimately contingent. In related, albeit distinguishable, ways, torture shows us a truth about ourselves as individuals and as a society. In the most direct and literal sense, torture teaches us as individuals that we are slaves to our bodies and that our beliefs, our values, and our moral obligations—in short, all that makes us human—count for nothing when our bodies are at stake. And while this is true literally about the human body, it is also true metaphorically about the body politic. When it comes to it, we as human beings will do whatever it takes to stop the pain, just as we as societies will do whatever it takes to preserve our corporate identity.

To fully understand this truth is to deny that law is possible. Indeed, it is to deny that human life as we generally conceive of it is possible. For just this reason, we cannot know this truth. Yet neither can we fully evade it.

The bulk of this Article consists of an investigation of how we mediate between the impossibility of knowledge and the impossibility of evasion. It is organized as follows. In Part I, I ask the question what is so bad about torture. I examine a standard definition of torture and argue that the usual arguments in support of the definition will not withstand analysis. In Part II, I advance a set of concerns that leads to a different definition. Here, I spell out and elaborate on the idea that torture forces us to confront a truth we must deny—that our will is ultimately the slave to our body. In Part III, I argue that our inability to confront this truth illuminates a variety of other legal practices—such as the law's treatment of abortion, euthanasia, and sex—that seem far removed from torture. Finally, in a brief Conclusion, I raise troubling questions about whether evading torture's truth is either desirable or possible.

I. WHAT IS SO BAD ABOUT TORTURE(?)

The awkward punctuation of the title I have given to this Part reflects my ambivalence about analytic strategy. One might begin a normative investigation of torture by specifying a definition of the practice and then problematizing its negative normative valence. This strategy involves asking a question, and not just a rhetorical one: What is, after all, so bad about torture? Alternatively, one might begin by holding constant a negative normative valence and problematizing various definitions. This strategy involves giving an answer; if successful, it produces an argument for why torture *is* so bad and a definition of torture that corresponds to the evils that have been identified.

The strategy I have chosen involves mediating between these two poles. I begin with a standard definition of the practice and argue that this definition does not easily map onto torture's negative reputation. I then adjust the definition so as to reconcile it with our normative intuition. The attempt to do so, however, leads to a second sort of mediation. It turns out that defining torture in a fashion that makes it normatively unattractive throws light on a variety of other practices and beliefs that, at first blush, seem to have nothing to do with torture. When these practices are considered against the backdrop of torture, they reveal a disturbing and unexpected ambivalence about the ways in which our minds and bodies interact.

Let us start, then, with a definition. Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷ (Convention Against Torture) defines the practice as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁸

¹⁷ 1465 UNTS 85 (Dec 10, 1984, entered into force June 26, 1987).

¹⁸ *Id.* The Convention binds each party to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" and provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *Id.* Art 2(1)–(2), 1465 UNTS 85.

The definition contains the following elements:

- (a) an act not arising from, inherent in, or incidental to a lawful sanction;
- (b) causing severe physical or mental pain or suffering;
- (c) intentionally inflicted by or at the instigation or with the consent or acquiescence of a public official or a person acting in an official capacity;
- (d) for the (apparently illustrative) purposes of punishment, information gathering, intimidation or coercion, or for reasons of discrimination.

These elements seem straightforward and map onto strongly and widely held intuitions. However, this matter-of-factness conceals a series of normative puzzles—puzzles that are explored in the next two Parts.

A. Torture and Nonconsequentialism

Some of these puzzles are rooted in the Convention's nonconsequentialist and absolutist orientation. One might wonder, for example, why must torture involve an act, when a failure to act (not amounting to consent or acquiescence) can also result in "severe pain or suffering?"¹⁹ Similarly, why must the pain or suffering be "severe,"²⁰ and why

The United States ratified the Convention in 1994, but it did so with some limiting understandings. In particular, the United States ratification was conditioned on the view that

in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

1 *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003* 270, 274 (UN 2003) (detailing the declarations and reservations of signatories to the Convention Against Torture). See also 18 USC §§ 2340–2340A (2000) (criminalizing torture).

¹⁹ The Convention does bind parties to take affirmative measures to prevent torture. Convention Against Torture, Art 2(1), 1465 UNTS 85. However, the "torture" that parties are obligated to prevent is defined so as to necessitate an act, consent, or acquiescence. Hence, a party is under no obligation to prevent failures to act even when they cause severe pain or suffering.

²⁰ Just how limiting this requirement might potentially be is illustrated by understandings and interpretations advanced by the United States when the Convention was ratified. U.S. ratification was accompanied by the understanding that "in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering." See *Memorandum for Alberto R. Gonzales* at 16 (cited in note 9), quoting S Treaty Doc No 100-20 at 4–5 (1988). Administration officials added their understanding that "rough treatment as generally falls into the

is severe pain inflicted to achieve the ends of punishment, information gathering, or intimidation especially troublesome when some other, unspecified purposes (and one specified purpose—the infliction of a lawful sanction) are apparently outside the reach of the prohibition?

These questions arise, I think, because of the intersection of the political compromises necessary to secure ratification on the one hand and the Convention's nonconsequentialist, absolutist orientation on the other.²¹ It was apparently important to the framers that the prohibition be uncompromising. But absolutism is a two-edged sword. If prohibitions are really to be unconditional, then one had best be very careful to limit the scope of what is prohibited. It is here that the evasions of the High-Minded Moralists take hold. Moralists can afford to be high minded, but only because they sharply limit what they are high minded about. Put differently, they can avoid morally problematic balancing of evils only by tacitly building the balancing into the definitional stage.²²

In the context of torture, there are two limitations built into the definition. First, there are restrictions on *what* is covered. If the scope of coverage is too broad, the absolute prohibition becomes impractical. Hence the Convention's restriction of coverage to *severe* pain or suffering and to acts undertaken for a limited set of purposes.²³

I will return to this limitation later in this Article. For present purposes, however, I want to focus on a second limitation: a restriction on *who* is covered. For reasons that will become apparent, a nonconsequentialist, absolutist version of the right not to be tortured entails "agent relativity."²⁴ A right is agent-relative when a person can respect

category of 'police brutality,' while deplorable, does not amount to 'torture.'" *Memorandum for Alberto R. Gonzales* at 17, quoting S Treaty Doc No 100-20 at 4.

²¹ The nonconsequentialist nature of the prohibition is emphasized by its substantive requirement that "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture." Convention Against Torture, Art 2(2), 1465 UNTS 85.

²² See Tindale, 22 Soc Theory & Prac at 352 (cited in note 8) ("[A] state or group can adopt a definition according to which their particular practice would not qualify [as torture] in order to support the claim that they do not endorse torture."). To observe this technique at work, see *Memorandum for Alberto R. Gonzales* at 1–2 (cited in note 9), which limits the Convention Against Torture and 18 USC § 2340 to reach "only the most egregious conduct":

Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.

²³ And hence the conditions the United States imposed on its ratification of the Convention, which further limit its scope. See note 18.

²⁴ I borrow this terminology from Michael Moore's sophisticated account. See Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev 280, 297–334 (1989) (utilizing notions of an agent's blameworthiness to limit the use of consequentialist considerations to justify other-

the right simply by restraining one's own conduct. Put differently, agent relativity places a duty on those who want to inflict the proscribed harm themselves, but no duty on those content to let others do the dirty work for them.

The Convention embraces agent relativity by limiting the scope of coverage to "public official[s] or other person[s] acting in an official capacity." Part of the motive for this limitation is no doubt the need to prevent liability for private acts that governments might have difficulty controlling. However, agent relativity is also linked to nonconsequentialism because if rights were not agent-relative, a consequence of respecting the right of one person might be the violation of the right of another person. But then whether rights were violated would, inevitably, depend upon consequences, which is what nonconsequentialists want to deny.²⁵

Consider, for example, a hypothetical situation invented by Joel Feinberg.²⁶ A dictator from country X captures citizens of country Y and threatens to torture the citizens to death unless country Y captures and tortures the dictator's opponents. If the torture right were not agent-relative, it would be violated regardless of whether the leaders of country Y capitulated to this blackmail. One would then be left with the unhappy task of balancing the severity of one rights violation against another. Moreover, once it is conceded that weighing is required when torture is on both sides of the scale, it becomes evident that balancing in other situations is required as well. Torture may be a grave evil, but it is not the only evil. A sensible balancing might lead to the conclusion that torture is permitted—even mandatory—when necessary to prevent a greater evil.

In order to avoid this dilemma, the drafters of the Convention definition limit its application to acts, consent, and acquiescence, excluding by implication failures to act. These limitations give the prohibition a kind of moral purity that will warm the hearts of High-Minded Moralists. By refusing to balance, the drafters express a judgment that torture is not just a wrong, but a wrong of such extraordinary magnitude that it cannot be tolerated even in extreme situations.

Unfortunately, this moral purity must be purchased at a considerable price. One difficulty is that it requires us to distinguish between

wise impermissible acts). See also Jeremy Waldron, *Rights in Conflict*, 99 *Ethics* 503, 503–04 (1989) ("[L]imits on the actions that are morally available . . . are *agent-relative* [when] each agent is taken to be concerned only with her own observance of the constraints.").

²⁵ On the relationship between agent relativity and conflicts between rights, see Waldron, 99 *Ethics* at 503–06 (cited in note 24) (arguing that because an agent-relative framework precludes conflicts between rights—an outcome contradicted by experience—a framework attaching third-party duties to individual rights is preferred).

²⁶ See Joel Feinberg, *Social Philosophy* 87–88 (Prentice-Hall 1973).

acts and failures to act. This is no simple task, as the definition's reference to "consent" and "acquiescence" makes clear. When does a failure to stop torture amount to acquiescence, and when is it no more than allowing a regrettable practice to continue?

Even if we succeeded in drawing the bright line between feaisance and nonfeaisance that agent relativity requires, it is not obvious that we should want to do so. It is possible to keep one's hands clean, but only by ignoring the evil that one is thereby allowing to happen.²⁷ One may readily concede that torture is often gratuitous and sadistic while also recognizing that there may be instances when it is the lesser of two evils. What is so bad about torture then? Indeed, in Feinberg's example, might not our readiness to use torture actually demonstrate our moral seriousness about the evil of torture?

It should come as no surprise that people are most comfortable with a stance of moral purity when they do not have to pay the price. As discussed above, there was little public debate in the United States about torture before a war on terrorism was declared. Now that people perceive the real possibility of conflict between a prohibition of torture and, for example, the prevention of mass slaughter (and, one might add, now that the United States government is at least flirting with the use of torture), some Americans have begun to equate clean hands with a kind of moral prissiness.²⁸

Once this argument is joined, it is hard to know how to make much progress. On one side, nonconsequentialists will ask reproachfully whether we are really prepared to stop at nothing to achieve our ends. They will invent increasingly gruesome hypotheticals to support their intuition that some means are simply out of bounds even in the pursuit of noble ends. Suppose that it is necessary to torture innocent children in order to deter their parents from terrorist attacks? Suppose that the rack and screw are what we require to secure life-saving

²⁷ Of course, if an actor is morally responsible for torture he fails to prevent, then, in some sense, his hands are not really clean. Conversely, as Michael Walzer points out in his classic essay, a thoroughgoing utilitarian would have to deny that the hands of a welfare-maximizing torturer were really dirty. Perhaps it is nonetheless utility maximizing for such a torturer to feel guilty about his conduct, but then we are driven to the conclusion that it is not utility maximizing to be a utilitarian. See Michael Walzer, *Political Action: The Problem of Dirty Hands*, in Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds, *War and Moral Responsibility* 62, 70-74 (Princeton 1974) (arguing that if the consequences of violating a moral rule are good, then a utilitarian must view the violation itself as good).

²⁸ See, for example, Dershowitz, *Why Terrorism Works* at 150 (cited in note 11) (reporting that after September 11, he had "asked [numerous] audiences for a show of hands as to how many would support the use of nonlethal torture in a ticking bomb case" and that "[v]irtually every hand [was] raised").

information?²⁹ Consequentialists, in turn, will counter with terrifying hypotheticals of their own. The “ticking bomb” problem has become standard in the literature.³⁰ Does it really make moral sense to refrain from torturing a single person if she knows the location of a nuclear device about to explode in a crowded city?

It should be evident that there will not be a clear victor in this war of hypothetical horrors. Intuitions about hypothetical situations do not get us very far if people do not share a common moral framework for evaluating outcomes, and this may be precisely what consequentialists and nonconsequentialists lack. Some foes of legalizing torture have recognized this problem and have therefore undertaken to show that they can win even if they play by the other side’s rules. Thus, even though the prohibition itself is formulated in nonconsequentialist terms, torture opponents are sometimes willing to make a consequentialist case against the practice. Here, I want to address four overlapping arguments that fit this description.

First, torture opponents make the empirical claim that torture seldom works, and that even when it does work, it is not worth the cost.³¹ Torture has the peculiar characteristic of being most severe in cases where the victim has the least information to convey (since a torture victim without information cannot stop the agony by providing the information), and the torturer will often be unable to know whether or not the victim truthfully conveyed the required information.³²

²⁹ Id at 146 (positing that threatening to kill an entire village may be necessary to get information); Samuel Scheffler, *Introduction*, in Samuel Scheffler, ed, *Consequentialism and Its Critics* 1, 3 (Oxford 1988) (considering the possibility of torturing a small child to get information from her father). Of course, believers in agent-relative morality are not precluded from making distinctions between types of consequences. For a detailed set of such distinctions in the torture context, see Moore, 23 *Israel L. Rev.* at 298–308 (cited in note 24) (arguing that when a moral agent is faced with a set of permissible choices he may, perhaps must, consider the consequences of his choice).

³⁰ See, for example, Dershowitz, *Why Terrorism Works* at ch 4 (cited in note 11) (using the ticking bomb hypothetical to argue for torture warrants because they would, among other things, make officials publicly accountable for their actions in such cases); Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 *UCLA J. Intl L. & Foreign Aff.* 89, 102–05 (2001) (noting the ticking bomb problem as an example of when torture might be morally justified).

³¹ See, for example, Peter Maass, *Torture, Tough or Lite: If a Terror Suspect Won’t Talk, Should He Be Made To?*, *NY Times D4* (Mar 9, 2003) (“[M]any terrorism experts believe that in the long run torture is a losing strategy.”); Heymann, *Torture Should Not Be Authorized*, *Boston Globe* at A15 (cited in note 8) (“Torture is a prescription for losing a war for support of our beliefs in the hope of reducing the casualties from relatively small battles.”); Alisa Solomon, *The Case Against Torture*, *Village Voice* 56 (Dec 4, 2001) (citing a CIA training manual and a study of Argentina’s dirty war for the proposition that torture is ineffective).

³² See, for example, Tindale, 22 *Soc. Theory & Prac.* at 361–62 (cited in note 8) (arguing that “victim control” is a myth because of difficulties in identifying an individual who actually possesses useful information); Shue, 7 *Phil. & Pub. Aff.* at 135 (cited in note 8) (discussing the prob-

Moreover, torture creates resentments, fears, and hatreds that, in the long run, are far more destructive than any evil it might avoid.³³

Second, torture opponents point to the risk of the slippery slope. Perhaps individual instances of torture might be justified if they stood alone, but they will not stand alone. Moral aversions, once overcome, are not easily reestablished. Moreover, once torture is legalized, there will be torture bureaucracies whose existence will depend upon frequent use of the practice.³⁴ In short, the absolute prohibition is all that stands between us and the long slide into barbarism.³⁵

Third, and relatedly, torture opponents direct our attention away from individual instances of torture and focus us instead on torture as an institution.³⁶ If there is to be torture, there must be torturers, who are trained and paid to engage in their trade. Putting government policy in the hands of sadists is bound to lead to corruption, gratuitous brutality, and abuse.³⁷

Finally, there is the Sophisticated Machiavellian response. This response amounts to a consequentialist argument for nonconsequentialism. If pushed, Sophisticated Machiavellians may privately concede that there will be times and places where torture is indeed justified. This concession cannot be made publicly or legally, however. Some

lem of an innocent bystander wrongly thought by a torturer to possess important information and concluding that such a bystander would have "no convincing way of demonstrating that he or she cannot comply").

³³ See Maass, *Torture, Tough or Lite*, NY Times at D4 (cited in note 31) ("Pain and humiliation will turn some innocent suspects into real terrorists and turn real terrorists into more-determined monsters."); Heymann, *Torture Should Not Be Authorized*, Boston Globe at A15 (cited in note 8) (claiming that the long-term costs of authorized torture outweigh the short-term benefits).

³⁴ Notice, however, that this argument ignores the possibility that legalizing torture would lead to less, not more, torture. See note 13. See also Dershowitz, *Why Terrorism Works* at 159 (cited in note 11).

³⁵ See Steve Chapman, *Should We Use Torture to Stop Terrorism?*, Chi Trib 31 (Nov 1, 2001) (citing the Israeli experience, which led to torture "in routine cases, not just extreme ones"); Kadish, 23 Israel L Rev at 353 (cited in note 15) (arguing that "the legitimization of repugnant practices in special cases inevitably loosens antipathy to them in all cases"). On the tendency toward expansion of the class of people subject to torture, see Conroy, *Unspeakable Acts* at 27-30 (cited in note 5) (describing how over time the Roman Empire continuously expanded the class of people who could be subject to torture and the category of circumstances under which torture was permissible).

³⁶ For a classic argument along parallel lines relating to the institutions that would be necessary to punish the innocent when utility-maximizing, see John Rawls, *Two Concepts of Rules*, in Robert M. Baird and Stuart E. Rosenbaum, eds, *Punishment and the Death Penalty: The Current Debate* 37 (Prometheus 1995).

³⁷ See Lincoln Allison, *The Utilitarian Ethics of Punishment and Torture*, in Lincoln Allison, ed, *The Utilitarian Response: The Contemporary Viability of Utilitarian Political Philosophy* 9, 24 (Sage 1990) (arguing that torture has a corrupting effect on norms, rules, and institutions); Kadish, 23 Israel L Rev at 356 (cited in note 15) (arguing that the legalization of torture may make the practice worse).

Machiavellians claim that once the bright-line prohibition is breached, the temptation to engage in the practice will be irresistible and there will be much too much of it. Ironically, the best way to achieve an “optimal” level of torture higher than zero is to pretend that the optimal level is zero.³⁸ Conversely, the Bush administration seems to have acted on the assumption that public acquiescence in torture will produce too little of it. Its secret embrace of the practice is consistent with the view that a little hypocrisy is what is necessary to grease the consequentialist gears.

I do not want to dispute the force of any of these objections to legalized torture. Yet in an odd way, the objections suggest reasons why torture opponents have been so reluctant to get bogged down in consequentialist argument in the first place. The difficulty is that each of these claims in effect concedes (at least for the sake of the argument) that the prohibition on legalized torture is empirically contingent and therefore vulnerable to the very slippage that torture opponents fear.³⁹ Most torture opponents are more comfortable with the nonconsequentialist approach, which makes no such concessions.

For example, one might readily agree that torture is costly and often does not work, but this hardly proves that there are no cases where the benefit outweighs the cost or that it never works.⁴⁰ Similarly, there is indeed the risk that torture, once established, might become institutionalized and lead to a slide toward barbarism. But this danger can be mitigated by subjecting the practice to careful supervision—for example, by requiring judges to issue the “torture warrants” that Alan Dershowitz has proposed.⁴¹ Moreover, the realization that there is a danger of a slide to the bottom itself provides a brake that can prevent the slide. If we are willing to overcome our moral revulsion against torture and engage in the practice knowing these risks, that fact alone provides a kind of assurance that in this particular situation, the practice is justified. Where the arguments for it are less compelling, the

³⁸ See generally Gross, 88 Minn L Rev 1481 (cited in note 11) (arguing that an absolute ban will ensure that the state will torture only when it can, *ex post*, publicly justify its violation of the ban, that is, only when it is optimal to torture).

³⁹ See Moore, 23 Israel L Rev at 295–96 (cited in note 24) (“[E]ven if consequential calculations justify the right rule they do not do so for the right reason. Such calculations make contingent what we experience as categorical.”).

⁴⁰ See Levinson, 81 Tex L Rev at 2030–31 (cited in note 1) (“To insist that torture is *always* inefficacious is not only implausible; it also removes any element of the tragedy that may accompany an absolute precommitment not to torture under any circumstances.”); Dershowitz, *Why Terrorism Works* at 137 (cited in note 11) (citing the use of torture by Philippine authorities that uncovered and helped prevent plots to assassinate the Pope, to crash eleven commercial airliners carrying approximately four thousand passengers into the Pacific Ocean, and to fly an airplane into CIA headquarters).

⁴¹ Dershowitz, *Why Terrorism Works* at 158–63 (cited in note 11).

revulsion and fear of a slippery slope will arm torture opponents with powerful rhetorical tools to stop the practice.

Indeed, the Sophisticated Machiavellian argument seems to acknowledge as much. The consequentialist case for nonconsequentialism holds that we will get the "optimal" level of torture by insisting that no torture is ever optimal. But if this is correct, does it not follow that we are now getting the optimal level, given the fact that torture continues in the face of our official position that it is never justified? Although some Machiavellians might in fact believe that we are at the optimal level, this conclusion will not sit well with people who think that torture is never acceptable. Moreover, even Machiavellians should be worried about being complicit in producing the wrong level of torture when they make Machiavellian arguments; by indiscreetly publicizing the acceptability and existence of torture they are, according to their own logic, creating a climate that will produce too much of the practice.

B. Pain and Its Purposes

It turns out, however, that even if we put to one side the problem of justifying nonconsequentialism, it is harder than one might think to explain what is so bad about torture. Indeed, I will argue that it is virtually impossible to explain what is so bad about the kind of "torture" proscribed by the Convention.

The most obvious objection to torture is that it involves the deliberate infliction of severe pain or suffering. We have already discussed the consequentialist response to this objection: sometimes the infliction of severe pain is necessary to avoid pain that is more severe still. Suppose that we return the favor extended by nonconsequentialists and agree for the moment to play by nonconsequentialist rules. Even if we do so, the fact that torture involves severe pain still fails to justify the prohibition.

The first problem is that the authors of the Convention have not simply prohibited the deliberate infliction of severe pain. It is here that we come upon the puzzling limitations on *what* is prohibited. The Convention seems to authorize the use of pain as a component of lawful sanctions. Even when unrelated to lawful sanctions, severe pain is proscribed only when it is inflicted for a particular set of purposes. To be sure, these purposes (securing information or confession, intimidation, coercion, punishment, or as an act of discrimination) are apparently only illustrative, but it seems clear that they are meant to illustrate something and that this something limits the domain of the prohibition. Were this not so, the framers presumably would simply have outlawed the infliction of severe pain.

The definition therefore leaves unclear what is so bad about pain inflicted for these particular purposes, as opposed to pain inflicted for

other possible purposes.⁴² For example, when a nation wages war, it regularly inflicts severe pain on enemy soldiers and, more often than we would like to admit, on civilian populations as well. The Convention's torture definition leaves entirely unclear why pain inflicted for the listed purposes is worse than pain inflicted for the purpose of waging a war.⁴³ The anomalies run even deeper. If one takes the definition at face value, it appears to outlaw the infliction of pain in circumstances where it might actually do some good (because, for example, it punishes or deters wrongful conduct or is useful in securing important information) while leaving completely unregulated the gratuitous, indiscriminate, and sadistic infliction of pain under circumstances where the infliction is an end in itself.

The linkage of pain to these purposes becomes still more mysterious when we consider the purposes individually. Take first the prohibition of severe pain as a means of punishment. Given the explicit exception for pain that is incidental to or inherent in a lawful sanction, it is not clear how much bite this prohibition really has. In any event, in evaluating the prohibition, one must ask the "compared to what" question. To be sure, severe pain is an evil, but it is not the only evil. Is it really so obvious that corporal punishment—even corporal punishment inflicting severe pain—is worse than the available alternatives?⁴⁴ The exception for lawful sanctions comes close to conceding that we may be doing criminals no favor when we outlaw torture as an alternative.

⁴² It is entirely possible, of course, that this limitation resulted from an unprincipled, political compromise necessary to secure ratification. Even if this is true, however, the compromise would only be effective if the ratifiers thought that there was a difference that mattered between pain inflicted for the specified purposes and pain inflicted for other purposes.

⁴³ See Dershowitz, *Why Terrorism Works* at 148 (cited in note 11):

The case against torture, if made by a Quaker who opposes the death penalty, war, self-defense, and the use of lethal force against fleeing felons, is understandable. But for anyone who justifies killing on the basis of a cost-benefit analysis, the case against the use of nonlethal torture to save multiple lives is more difficult to make.

Henry Shue has attempted to distinguish torture from death in combat on the theory that combat death, unlike torture, does not involve an assault on the defenseless, but, instead, a "fair fight." Shue, 7 Phil & Pub Aff at 127-30 (cited in note 8). The argument is unpersuasive. First, it is far from clear how "fair" the fight really is when, for example, the military might of the United States is brought to bear on the army of Iraq. Second, and more significantly, opponents of torture would surely not be satisfied if torture's victims were given ineffectual weapons that permitted them to engage in futile attempts to harm their tormentors. See also Tindale, 22 Soc Theory & Prac at 358-59 (cited in note 8) (arguing that a torture victim, like a soldier, may be a continuing threat).

⁴⁴ For an extended argument that it is not, see generally Graeme Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals* (Harrow and Heston 2d ed 1995) (arguing that prison is an ineffective punishment because it is variable along only one dimension—time—and therefore corporal punishment may be preferred due to its greater flexibility).

This problem has particular resonance in the United States, where capital punishment is still common. Capital punishment, itself, can be physically painful.⁴⁵ Moreover, even when it is not, it seems quite likely that many prisoners on death row would gladly trade a time-bound torture session for their lives. Of course, death penalty opponents will respond that, in part for this reason, capital punishment should also be outlawed. Still, it seems plausible that at least some prisoners would be willing to undergo torture to avoid lengthy periods of incarceration. One must ask with Foucault who, precisely, we are protecting by not offering prisoners this choice.⁴⁶

There is a similar set of problems when pain is used as a means of intimidation. A less freighted synonym for "intimidation" is deterrence, and deterrence theorists have something important to teach torture opponents.⁴⁷ These opponents tend to ignore the difference between a threat to engage in a practice and the actual use of the practice. To be sure, if the threat is to achieve its purpose, we must be ready to make good on it if called upon to do so. If we say that we are going to torture murderers, then, at least occasionally, we will have to torture some of them. However, a truly effective deterrent will not be used very often precisely because it is effective. If torture works, there will be very little torture. Depending on the shape of the "demand curve" for the conduct we wish to deter, the threat of an extremely painful punishment may end up causing less total pain than the threat of a more "humane" punishment.⁴⁸

Of course, it is also possible that torture will be ineffective. If this is the case, the practice should be avoided not because it is inhumane,

⁴⁵ See *Dawson v State*, 274 Ga 327, 554 SE2d 137, 144 (2001) (holding that death by electrocution violates the Georgia Constitution's provision against cruel and unusual punishment because it produces a "specter of excruciating pain and [a] certainty of cooked brains and blistered bodies"). See also Marian J. Borg and Michael L. Radelet, *On Botched Executions*, in Peter Hodgkinson and William A. Schabas, eds, *Capital Punishment: Strategies for Abolition* 143, 153–56 (Cambridge 2004) (describing the severity and frequency of pain during electrocution and lethal injection).

⁴⁶ See Michel Foucault, *Discipline and Punish: The Birth of the Prison* 24–31 (Vintage 1977) (Alan Sheridan, trans) (arguing that "educationalists, psychologists and psychiatrists" are tools of prison's "technology of power over the body," raising the idea that prison itself, like torture or capital punishment, is a means of exerting power over the body).

⁴⁷ The seminal work on deterrence is Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J Polit Econ 169 (1968). For some important qualifications, see generally Neal Kumar Katyal, *Deterrence's Difficulty*, 95 Mich L Rev 2385 (1997) (emphasizing the importance of activity substitution, effects on social norms, and various forms of cognitive errors to the deterrent effect of criminalization and punishment).

⁴⁸ See Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 Yale L J 315, 321 n 13 (1984) (describing how increasing punishment per offense, by decreasing the instances of criminal behavior and thereby decreasing the instances of punishment, can decrease total pain).

but because it is ineffective. The prohibition is thus, once again, reduced to a temporally and culturally contingent judgment about efficacy—surely not what torture opponents have in mind.⁴⁹

What, then, of the use of pain to secure information or confession? For reasons I spell out below, thinking about this purpose gets us closer to figuring out what is really wrong with torture. For now, though, it is important to see that the most common objections to the practice are unsatisfactory. Perhaps the most obvious objection to pain as a means of extracting information or confession is that it can be, and often has been, used to obtain untrue information and false confessions. It is surely the case that most people subjected to torture will say virtually anything to stop the pain. How, then, can we be sure that they are telling the truth?

It is an important fact that almost everyone will eventually “give in” to torture—a fact that I will return to in the next Part. It simply does not follow, however, that this fact makes torture inefficacious if we are interested in accurate information and true confessions. If we were really ready to discount information people give when confronted with powerful threats, we would be concerned about far more than torture. Consider, for example, the practice of plea bargaining.⁵⁰ Prosecutors regularly threaten defendants with lengthy jail sentences or even death unless they plead guilty, which is, after all, a kind of confession.⁵¹ If a defendant knows information that the prosecutor wants, there may also be a trade of a shorter sentence for testimony implicating another suspect. Often this trade is phrased as if it were an offer. The defendant is said to get a “break” in exchange for the testimony. But, of course, offers of this kind conceal an implicit threat. The defendant is likely to be incarcerated for many extra years unless he provides the testimony.

To be sure, we may be suspicious of confessions and information extracted under these circumstances. Thus, before a judge accepts a guilty plea, she must assure herself that there is a “factual basis” for

⁴⁹ See text accompanying note 39.

⁵⁰ See John H. Langbein, *Torture and Plea Bargaining*, in David M. Adams, ed., *Philosophical Problems in the Law* 464 (Wadsworth 2d ed 1996). Langbein argues that both plea bargaining and torture were responses to breakdowns in formal methods of proof. He uses the analogy to attack plea bargaining, but, of course, the valence of the argument can be reversed: in a world where plea bargaining is accepted, opponents of torture need to explain why it is relevantly different.

⁵¹ The Supreme Court has held that these threats are constitutional. See *Bordenkircher v. Hayes*, 434 US 357 (1978); *Brady v. United States*, 397 US 742 (1970). Over 90 percent of felony convictions in state courts nationwide are obtained by guilty pleas. See Kathleen Maguire and Ann L. Pastore, eds, *Sourcebook of Criminal Justice Statistics 1995* 498 table 5.47 (DOJ 1996).

it.⁵² If the defendant chooses to go to trial, prosecutors must reveal to defense attorneys the details of any bargain they have struck in exchange for testimony,⁵³ and often prosecution witnesses are subjected to rigorous cross-examination about the bargain. But these protections might be put in place for torture as well.

Perhaps torture places more pressure on a defendant or a witness than other sorts of threats, although the discussion above of the death penalty and lengthy incarceration throws some doubt on this claim. Even if the threat of torture is more efficacious, it does not follow that greater pressure will lead to more truth distortion. Indeed, when the torturer is interested in truthful information, the greater pressure may lead to more truth telling precisely because the torturer is likely to threaten further excruciating pain if the information turns out to be false.

Of course, in the case of confessions, the torturer may be interested in extracting an untrue statement. But this problem does not explain why the fruits of torture cannot be used when the torture victim reveals information that confirms the truth of his statement.⁵⁴ Moreover, jurors themselves are hardly unaware of torture's potential for truth distortion. So long as the torture is made publicly known, is it really very likely that jurors will be persuaded by its fruits when there is no confirmatory evidence?

II. TORTURE'S TRUTH

Thus, the standard linkage between pain and the purposes outlawed by the Convention's definition of torture is problematic. There is another story about torture, information, and confession, however, that gets closer to what is really at stake. Ironically, this claim rests not upon torture's truth-distorting capacity, but instead upon its ability to teach us a certain kind of truth.

The argument for this claim begins with the linkage between forced information gathering on the one hand and the values associated with liberal individualism on the other. In our legal culture, this linkage is most apparent with respect to the constitutional prohibition

⁵² See FRCrP 11(b)(3). See also *Santobello v New York*, 404 US 257, 261 (1971).

⁵³ See *Giglio v United States*, 405 US 150, 154–55 (1972) (finding a due process violation in the prosecution's failure to disclose to the jury an offer of leniency to its key witness). See also *United States v Ruiz*, 536 US 622 (2002) (holding that a defendant can waive the right to be informed of impeachment evidence against government witnesses by pleading guilty).

⁵⁴ The Supreme Court has made clear that even when statements are coerced by methods that fall far short of torture, the truth of the statement does not shield it from suppression. See *Rogers v Richmond*, 365 US 534, 541 (1961) (concluding that the Due Process Clause forbids the use of statements obtained by "constitutionally impermissible methods," even when the statements are corroborated by other evidence).

on compelled self-incrimination. The Self-Incrimination Clause,⁵⁵ which, not coincidentally, has its roots in opposition to torture,⁵⁶ can be justified in terms of ideas about individual consent that lie at the heart of liberal political theory.

At least superficially, liberals in the Kantian tradition face a difficult challenge when they try to justify criminal punishment. Criminals are effectively exiled from our moral community, and when we punish them to deter others, we seem to be using them solely as a means to the ends of others in violation of a Kantian categorical imperative. Kant and his followers met this challenge by resorting to the idea of consent. By committing crimes, the criminals consent to their own punishment in the Kantian sense because this punishment comports with the universal laws that they would legislate for themselves if they were free from contingent phenomena that limit true autonomy.⁵⁷ Indeed, it is only by punishing criminals that we respect their rights as choosing individuals. We do not, after all, punish trees that fall on people or wild animals that attack them. We punish free individuals who choose to violate the law precisely because they are not trees or wild animals.⁵⁸

Unfortunately, perhaps, many people not steeped in the Kantian tradition find this kind of consent quite counterintuitive.⁵⁹ Certainly, criminals who desperately seek to avoid capture and conviction have not consented to their own punishment in anything like the usual sense of the word. Whether or not the Kantian conception of consent makes sense, it turns out that a position that turns the Kantian conception on its head has been at least as influential. On this view, the justification for punishment is precisely that the criminal does *not*, or at

⁵⁵ US Const Amend V (“[N]or shall [any person] be compelled in any criminal case to be a witness against himself.”).

⁵⁶ See Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 326 (Oxford 1968) (“[T]he same forces that brought about the right against self-incrimination brought about an end to the use of torture.”).

⁵⁷ See Immanuel Kant, *Metaphysical Elements of Justice* 142 (Hackett 2d ed 1999) (John Ladd, trans):

When . . . I enact a penal law against myself as a criminal it is the pure juridical legislative reason (*homo noumenon*) in me that submits myself to the penal law as one capable of committing a crime, that is, as another Person (*homo phaenomenon*) along with all the others in the civil union who submit themselves to this law.

⁵⁸ For a famous argument along these lines, see G.W.F. Hegel, *Philosophy of Right* 97 (Prometheus 1996) (S.W. Dyde, trans) (“The injury which the criminal experiences is inherently just because it expresses his own inherent will, is a visible proof of his freedom and is his right.”).

⁵⁹ For Kant’s (perhaps labored) effort to explain the contradiction, see *Metaphysical Elements of Justice* at 142 (cited in note 57) (“No one suffers punishment because he has willed the punishment, but because he has willed a punishable action.”).

least is *not made* to, consent to his own punishment.⁶⁰ On this account, the state is entitled to control a criminal's physical conduct and his body. It can incarcerate him and, perhaps, even whip him or kill him. The state has no business, however, controlling the criminal's mind. It can act against a criminal's will, but it cannot enlist his will for its own purposes. This is so because what makes someone an individual—what defines the essence of the person that the state is bound to respect—is his choosing capacity.

This is a powerful intuition, and it helps explain why it is that information and confession have something to do with torture. On this account, torture is bad because the extraction of information and professions of guilt can come about only by the exercise of will. A tortured subject is dehumanized in the sense that she turns her will over to an alien force. The intuition standing alone does not provide a full account of the torture prohibition, however. The difficulty is that the relevance of information is established only by bringing into question the relevance of pain. A pair of self-incrimination cases illustrates the problem.

In *United States v. Hubbell*,⁶¹ a prosecutor served a subpoena on Hubbell requiring him to produce some 13,120 pages of personal documents and records. The prosecutor then used these documents to indict Hubbell for various crimes related to tax, mail, and wire fraud. When the case came before the Supreme Court, the Court held that the subpoena violated Hubbell's self-incrimination right and dismissed the indictment.⁶²

In contrast, in *Schmerber v. California*,⁶³ a police officer, who suspected Schmerber of drunk driving, ordered that blood be extracted from his arm. A blood test demonstrating that Schmerber had alcohol in his body was introduced against him at his trial, and he was convicted. Schmerber claimed that the use of his own blood against him in a criminal prosecution violated his privilege against self-incrimination, but this time the Supreme Court rejected the claim and affirmed the conviction.⁶⁴

On the theory of liberal individualism spelled out above, the different treatment of Hubbell's and Schmerber's claims makes sense. Hubbell was forced to do something. The subpoena required an exercise of his will. He was the one who had to "consent" by turning over

⁶⁰ Kant himself stated, "If what happens to someone is also willed by him, it cannot be a punishment." *Id.*

⁶¹ 530 US 27 (2000).

⁶² *Id.* at 43, 45.

⁶³ 384 US 757 (1966).

⁶⁴ *Id.* at 765.

his papers, thereby in effect cooperating in his own destruction. In contrast, Schmerber was not forced to do anything. To be sure, something was done to him—his body was subjected to an invasive procedure—but the procedure was completed *against* his will, rather than by *utilizing* his will.⁶⁵ He was therefore not implicated in his own downfall in the way that Hubbell was implicated. If one believes that the government should not be permitted to require individuals to will their own destruction, both *Schmerber* and *Hubbell* seem rightly decided.⁶⁶

The difficulty, though, is that the cases make no sense at all from the standpoint of the linkage between confession or information on the one hand and pain on the other. What happened to Hubbell was unconstitutional even though he suffered no physical pain and was not threatened with physical pain. In contrast, Schmerber was forced to undergo an invasive procedure that inflicted pain upon him. On the facts of the *Schmerber* case, the pain was quite minor, but the logic of *Schmerber* applies to much more serious pain. For example, on the Court's theory, a major operation designed to extract a bullet from a suspect's body would not raise self-incrimination problems.⁶⁷

Even though opposition to torture and the self-incrimination privilege are historically linked, these examples suggest that there is actu-

⁶⁵ It does not follow that whenever incriminating evidence is gained through use of the defendant's will, the Fifth Amendment privilege is implicated. The exercise of will is a necessary, but not sufficient, condition for the privilege to attach. It must also be shown that the exercise of will reveals something about the defendant's internal mental state and not just "physical" or "nontestimonial" evidence. See, for example, *Doe v. United States*, 487 US 201, 219 (1988) (holding that a court order requiring a defendant to sign a form directing foreign banks to release records is not covered by the Fifth Amendment privilege because such a directive is "not testimonial in nature"); *United States v. Dionisio*, 410 US 1, 5-7 (1973) (holding that the Fifth Amendment privilege does not protect against the compelled production of a person's voice exemplars for use in voice identification analysis); *Gilbert v. California*, 388 US 263, 266-67 (1967) (holding that the taking of handwriting exemplars does not violate the Fifth Amendment privilege). Consider *Pennsylvania v. Muniz*, 496 US 582, 590-600 (1990) (holding that, in an inquiry to establish whether a defendant was intoxicated, the Fifth Amendment privilege protects against use of the defendant's inability to give the date of his sixth birthday because the defendant's response is "testimonial," but that the privilege does not protect against the use of the defendant's "slurred speech" because such evidence is "nontestimonial").

⁶⁶ It logically follows that cases like *Hubbell*, which involved the defendant's own production of documents in response to a subpoena, should come out differently if the government extracts the information against the defendant's will, such as through the direct seizure of documents; indeed, the Court has so held. See, for example, *Andresen v. Maryland*, 427 US 463, 473 (1976) (upholding the seizure and introduction of defendant's business records even though some of the records contained statements made by the defendant). But although the Self-Incrimination Clause poses no obstacle to such seizures, the Fourth Amendment's reasonableness and probable cause requirements do.

⁶⁷ It does not follow that such an operation would be constitutional. The Supreme Court has held that it would violate the Fourth Amendment protection against unreasonable searches and seizures. See *Winston v. Lee*, 470 US 753, 760-66 (1985).

ally a serious tension between the two. This is so because opposition to torture is focused on the body, whereas opposition to self-incrimination is focused on the mind. Although both torture and the self-incrimination privilege concern information and confession, the evils they address seem different. Torture is about physical pain, while the privilege is about disembodied will. The challenge, then, is to give an account of torture that captures its physicality and embodiment.

We can begin to meet the challenge by focusing on the fragility of the distinction between *Hubbell* and *Schmerber*. To anyone versed in modern neuroscience, the Court's distinction between mind and body is bound to seem atavistic.⁶⁸ Modern brain science is relentlessly materialist.⁶⁹ Scientists watching a brain scan while different sections of the brain "light up" as people "will" different things are bound to believe that Cartesian dualism is laughably old-fashioned. For these scientists, Hubbell's "will" is the product of nothing more mysterious than the chemical and electrical activity going on in his physical brain, which is not different in principle from the chemical activity going on in Schmerber's blood.

This is not to say that what happened to Schmerber and Hubbell is a source of no concern. Instead, the point is that from a "scientific" perspective, the locus of the concern in both cases is the Fourth Amendment protection against unreasonable searches and seizures, rather than the Fifth Amendment privilege against self-incrimination. Whereas the Fifth Amendment is about the realm of metaphysics, where mysterious, nonmaterial entities like will and choice float around in the ether, the Fourth Amendment protects real things that one can get one's hands on. It is about "persons, houses, papers, and effects."⁷⁰

⁶⁸ See, for example, Oliver Sacks, *Neurology and the Soul*, NY Rev Books 44, 45 (Nov 22, 1990) (rejecting "mystical" and "dualistic" explanations for human behavior). As Steven Goldberg has explained, modern science has advanced "by setting [dualism] aside, that is, by defining inquiries into the spiritual as nonscientific." Steven Goldberg, *Gene Patents and the Death of Dualism*, 5 S Cal Interdiscipl L J 25, 36 (1996).

⁶⁹ See Paul M. Churchland and Patricia S. Churchland, *Intertheoretic Reduction: A Neuroscientist's Field Guide*, in Richard Warner and Taduesz Szubka, eds, *The Mind-Body Problem: A Guide to the Current Debate* 41, 53 (Blackwell 1994) (reporting that they are "very upbeat about the possibility of reducing psychology to neuroscience"). Even neurobiologists whose work is sometimes treated as opposing strong claims of artificial intelligence nonetheless emphasize that they are not dualists. See, for example, Gerald M. Edelman, *Bright Air, Brilliant Fire: On the Matter of the Mind* 193-95 (Basic 1992) (arguing that, in theory, material artifacts could be constructed with high-order consciousness but stressing that current technology is far off from such an accomplishment). For a discussion, see Steven Goldberg, *Culture Clash: Law and Science in America* 158-66 (NYU 1994) (exploring the critiques of artificial intelligence offered by John Searle, Roger Penrose, and Gerald Edelman, and noting that each critic allows room for antidualist conceptions of the mind).

⁷⁰ US Const Amend IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").

For hard-nosed materialists, the brain is, after all, just another “effect.” Hence, both Schmerber and Hubbell have potentially valid claims under the Fourth Amendment, but only because a material thing (Hubbell’s brain or Schmerber’s blood) has been interfered with.⁷¹ Put differently, materialists return our focus to embodied pain, but this refocusing only reintroduces the puzzle about the relevance of confession and information.

So far, I have focused on the fragility of the *Schmerber/Hubbell* distinction when viewed against the backdrop of scientific materialism. It turns out, though, that the plausibility of scientific materialism is also fragile. Whatever scientists say, surely few of us actually live our lives as if reductive materialism were true.⁷² Such a belief would require us to treat our own goals, beliefs, feelings, and emotions as no more than the byproduct of entirely determined, physical processes. It is doubtful that even scientific materialists can really believe this. I am told that neurologists, too, fall in love, join political movements, get angry and sad and overjoyed and fearful.⁷³ Can they really believe that all these experiences are no more than the outputs of a complex machine?⁷⁴ Neurologists study the physical brain when it is subject to all sorts of

⁷¹ I do not mean to say that the claim would prevail. In fact, the Court rejected Schmerber’s Fourth Amendment claim. But whereas it held that the Fifth Amendment was simply inapplicable to the drawing of blood, it found that the Fourth Amendment applied, but was satisfied. *Schmerber*, 384 US at 767 (“[I]f compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.”); id at 770 (“The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened ‘the destruction of evidence.’”).

On the limited Fourth Amendment protection afforded against subpoenas, see *Oklahoma Press Publishing Co v Walling*, 327 US 186, 208 (1946) (stating that, in the context of subpoenas rather than seizures, the Fourth Amendment protects only against “too much indefiniteness or breadth in the things required [by the subpoena] to be ‘particularly described’”).

⁷² For a well-known argument along these lines, see Peter Strawson, *Freedom and Resentment*, in Gary Watson, ed., *Free Will* 59, 66–67 (Oxford 1982) (distinguishing between the “participant attitude” and the “objective attitude”).

⁷³ As Lloyd Weinreb put the point in a related context, “The most committed behaviorist does not disregard the distinction between responsible action and nonresponsible behavior in the conduct of his life. If he did, we would lock him up.” Lloyd L. Weinreb, *Oedipus at Fenway Park: What Rights Are and Why There Are Any* 48 (Harvard 1994).

⁷⁴ Consider Richard Swinburne, *Body and Soul*, in Warner and Szubka, eds., *The Mind-Body Problem* 311, 312 (cited in note 69):

There really are events which humans experience and which in consequence they can know about better than does anyone else who studies their behavior or inspects their brain. My sensations, for example—my having a red afterimage or a smell of roast beef, or my feeling a pain—are such that, while I can learn about them in the same ways as others do (by inspecting my brain-state or studying a film of my behavior), I have an additional way of knowing about them other than those available to the best student of my behavior or brain: I actually experience them. Consequently they must be distinct from brain events, or any other physical events.

stimuli, but do they ever study the brain of neurologists who are studying the brain? Even neurologists treat their own theories as somehow outside the determined, physical processes that they are studying.

None of this is to deny that scientific materialism is "true," if, indeed, truth has any meaning when it departs from ways that we are destined to see the world and live our lives.⁷⁵ On the contrary, my central claim is that our repugnance to torture is rooted in our fear that it is true. On some level we know that materialism is true. How could a mind possibly exist without a material substrate? But on a different level, we also know that dualism is true. How could my deepest beliefs and desires amount to no more than chemical reactions?

It is this insight that links embodied pain with confession and information. What is wrong with torture is that it reminds us of something that we do not want to know: that our belief in materialism and our belief in the existence of human will cannot be reconciled. Moreover, torture forces us to resolve the conflict by admitting, against our "will" (if you will), that we have no will. When the pain is intense enough, we must concede that we are no more than our bodies.

Elaine Scarry has made the point as eloquently as anyone. For her, "[i]ntense pain is world-destroying. In compelling confession, the torturers compel the prisoner to record and objectify the fact that intense pain is world-destroying."⁷⁶ This is so because "physical pain always mimes death and the infliction of physical pain is always a mock execution." Torture reminds us of death in a concrete way, and when we are so reminded, we begin "to experience the body that will end [] life, the body that can be killed, and which when killed will carry away the conditions that allow [a person] to exist."⁷⁷

Of course, Scarry is not claiming that we do not die. It is not, then, that torture convinces us of something that is not true. Quite the contrary, torture convinces us of a truth with which we literally cannot live. The torture victim learns that he is the slave to his body, that all that he believes, values, and loves is, in the end, hostage to his physical well-being, that he is willing to give up everything to bring about the cessation of physical pain. For many torture victims, this lesson is reinforced by the sense of betrayal—of self and others—that torture produces. When the torture victim speaks—revealing the location of a comrade in arms, for example, or verbally repudiating the cause he has

⁷⁵ See Strawson, *Freedom and Resentment* at 68 (cited in note 72) ("A sustained objectivity of inter-personal attitude, and the human isolation which that would entail, does not seem to be something of which human beings would be capable, even if some general truth were a theoretical ground for it.").

⁷⁶ Scarry, *The Body in Pain* at 29 (cited in note 10).

⁷⁷ *Id.* at 31.

fought for—the victim is often implicated in the destruction of relationships and commitments that, he had previously thought, defined his essence.

It turns out, the victim learns, that his essence lies elsewhere. It consists of something much baser—of the flesh and sensations he shares with animals rather than the ideas and ideals that, he had thought, linked him to something higher. How can we expect a person who has learned this lesson to continue his life? How is he again to make sense of his plans, hopes, and attachments? Even when the victim's body survives, torture is a kind of death precisely because it reduces the victim to his body.

Anyone who doubts any of this need only listen to the voice of the tortured. Consider the words of Jean Améry:

Whoever is overcome by pain through torture experiences his body as never before. In self-negation, his flesh becomes a total reality. . . . [O]nly in torture does the transformation of the person into flesh become complete. Frail in the face of violence, yelling out in pain, awaiting no help, capable of no resistance, the tortured person is only a body, and nothing else beside that.

...

Whoever has succumbed to torture can no longer feel at home in the world. The shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully, will not be regained.⁷⁸

We do not want to know what Jean Améry knows, and our fear of this knowledge is what explains torture's linkage between pain on the one hand, and the extraction of information or confession on the other. Information and confession are important components of torture because they can be extracted only by the exercise of will. They are not the only components of torture, however. After all, the state regularly uses various forms of coercion to commandeer the will so as to extract information and confession in circumstances that do not remotely resemble torture. I do not file my tax returns because of a perfectly free and uncoerced impulse to tell the government about my sources of income.⁷⁹

⁷⁸ Jean Améry, *Torture*, in Lawrence L. Langer, ed., *Art from the Ashes: A Holocaust Anthology* 121, 130–31, 136 (Oxford 1995) (Sidney Rosenfeld and Stella Rosenfeld, trans). For additional firsthand accounts of the experiences of torturers and their victims, see generally Conroy, *Unspeakable Acts* (cited in note 5).

⁷⁹ There is, to be sure, a Fifth Amendment right not to reveal incriminating information on a tax return, but no general right not to reveal "private" information on the return. See *United States v. Sullivan*, 274 US 259 (1927) (holding that the Fifth Amendment provides no general

The problem with torture is not just that the victim's will is commandeered but that it is commandeered by the dehumanizing realization that all that we associate with being human is an illusion. Threats to the body uniquely carry this consequence because they alone lead us to forsake the version of ourselves that is not simply a corporeal machine. It follows that although torture's detractors are right to focus on pain, many of them are mistaken about the role that pain plays. It is not the pain itself that is the essence of torture's evil. It is rather what the pain produces—the terrible betrayal of our self-understanding of human life.

This conception of torture helps explain the insistence of torture's opponents on nonconsequentialism. Because torture's truth dispels the illusion upon which human freedom depends, torture is difficult to justify as a means to advance human ends. To justify torture because of its consequences is to engage in a rational investigation of means and ends. But torture denies the possibility of rationality and choice. If we are to learn torture's truth, there literally cannot be humans, and without humans, moral inquiry into means and ends loses its meaning.⁸⁰

I believe that an argument along these lines provides the best account of what *is* so bad about torture, but it requires a redefinition of what ought to count as torture. How would the Convention definition have to be changed to fit this account?

First, this understanding of torture changes the purposes for torture that should be prohibited. On this account, the prohibited purposes include those ends, but only those ends, that can be achieved only by an exercise of the victim's will. These purposes may, or may not, involve the acquisition of information. Consider, for example, the use of physical pain to force a victim to profess a religious belief. This purpose is not among those specifically listed in the Convention definition (although it may well fall under the "coercion" rubric), yet it is surely a form of torture. This is so because such a profession can come about only through an exercise of the victim's will. Compare this case to the case of a victim forced to undergo extremely painful surgery to

right not to file an income tax return). Compare *Marchetti v. United States*, 390 US 39 (1968) (holding that the Fifth Amendment privilege may be invoked where a tax is directed at inherently criminal activity).

⁸⁰ I do not mean to suggest here that this argument defeats the consequentialist position on torture. "Acoustic separation," or psychological denial, might permit us to use torture against some without allowing torture's truth to defeat the projects of the rest of us. This is not merely a theoretical possibility. Torture exists, yet most of us seem to have little difficulty hanging onto the "illusion" of human freedom. So long as the illusion can be maintained, consequentialists might insist that the cost of torture to some might be worth the benefit achieved for others. On "acoustic separation" generally, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv L Rev 625 (1984).

extract a bullet to be used as evidence against him. Although this practice is covered by the Convention definition (because it involves severe pain inflicted for the purpose of gaining information), I would not count it as torture. The surgery can be performed on the victim; she need not—indeed, typically cannot—perform it on herself. It therefore avoids the special paradoxical mental element that is torture’s hallmark.⁸¹

I think that it also follows from my argument that, contrary to the Convention definition, torture usually has nothing to do with punishment or intimidation, at least if we take intimidation to mean general deterrence. Of course, there may be other objections to severe pain when it is imposed for these purposes. It is worth emphasizing again that torture is not the only evil in the world. But neither retributive punishment nor disabilities imposed to discourage misbehavior by others have the special characteristics that make torture an evil. They are things that are done to people, not things that people do to themselves. They therefore lack the degradation that comes with the sacrifice of will for the sake of body.⁸²

Moreover, if my understanding is correct, physical pain need not be “severe” to count as torture. On the contrary, there is a sense in which the less severe the physical pain, the more troublesome the practice becomes. A person who confesses in response to only moderate pain is even more a slave to his body than a person who confesses in response to severe pain.⁸³ If I am right that the state should be forbidden from subjecting individuals to the humiliation that comes from the realization that the body is all, any use of physical pain to extract information or confession should be prohibited.⁸⁴

⁸¹ It is worth emphasizing that the fact that this is not torture does not mean that it should be (or is) permissible. See *Winston*, 470 US at 766 (holding that a compelled surgery to secure evidence would be an “unreasonable search” within the meaning of the Fourth Amendment).

⁸² I do not mean to suggest that physical pain inflicted for other purposes has no effect on the mind. Of course it does, as do other sorts of punishments that no one would count as torture. What makes torture different is not that it affects the mind, but that it requires the subjugation of mind to body.

⁸³ This argument must be qualified to the extent that our primary worry is about the effect of such “torture” on people other than the victim. Suppose, for example, that a victim with a very low pain threshold confesses after the infliction of low-level pain. This sort of “torture” requires the victim to learn a devastating fact about himself: he is such a slave to his body that he will sacrifice important commitments to save himself from even relatively minor discomfort. For the rest of us, however, the effect may be far less devastating. Because the pain is only “minor,” we will be able to tell ourselves that we would be able to withstand it and, so, avoid sacrificing our mind to our body.

⁸⁴ For this among many other reasons, the effort made by the Justice Department’s Office of Legal Counsel to narrowly construe federal statutes against torture by emphasizing the requirement that the suffering be “severe” is seriously misguided. See *Memorandum for Alberto R. Gonzales* at 5–8 (cited in note 9). When the contents of the memorandum became publicly known, the Justice Department disavowed it.

Conversely, it is a category mistake to define torture as involving severe *mental* pain.⁸⁵ The infliction of mental pain has its own problems as a means of advancing the state's ends, but it will not do to assert that the state may never use this technique. Witnesses and suspects are regularly subjected to severe mental pain to extract information. A person who is worried about spending months incarcerated for contempt if she does not testify surely suffers severe mental pain, sometimes even resulting in breakdown or suicide, but this is hardly torture. Torture is about the body, not the mind—or, more precisely, it is about what happens to the mind when we realize that we are only body.

III. TORTURE, BIRTH, DEATH, AND SEX

A skeptic might respond to these arguments by pointing out that metaphysical concerns about the relationship between mind and body seem far removed from the source of the moral revulsion that many people feel when confronted with actual instances of torture. Moreover, the skeptic might add, if reductive materialism really is true, are we not better off knowing the truth? And is this truth really so terrible? For some people, at least, there is a kind of liberation that comes from pure physicality.

I want to concede at the outset that there is not a set of completely dispositive answers to these objections. Indeed, at the end of this Article, I will suggest that the absence of such answers raises the most troubling concerns of all about torture's truth. For now, however, I want to explore lines of inquiry that push us toward the conclusions I am defending. If we can find other practices and beliefs that cohere with my claims about torture, then these claims are at least more plausible. Conversely, if I am right about the reasons for our rejection of torture, those reasons might also provide a normative grounding for the other practices and beliefs.

The task, then, is to examine other situations where body threatens to subsume will and to think about our reactions to them. I believe that this examination throws light not just on the torture prohibition, but on our reactions to these other situations as well.

A. Pregnancy and Abortion

There are few human experiences that emphasize our sheer physicality more than pregnancy and childbirth. Among other things, preg-

⁸⁵ I put to one side here the severe mental pain that may occur because of the very threat of torture to oneself or to another. Moreover, it is easy to imagine cases where the boundary between mental and physical pain is indistinct. Indeed, the difficulty of drawing this line is central to my argument.

nancy is an unwilling, uncontrollable, and sometimes unwanted physical transformation progressing inexorably within a compressed period of time. Childbirth, the frequent culmination of pregnancy, is not only uncontrollable but also extremely painful. The moment when a woman goes into labor often cannot be predicted, and labor itself is often experienced as an excruciating loss of control over one's body.⁸⁶

I do not mean to suggest that pregnancy is always experienced in a negative fashion. Of course this is not true. What is true is that the most troubling aspects of pregnancy mirror the most troubling aspects of torture. In both cases, the phenomena remind us in disquieting ways of how much power our bodies have over us. It follows from this that pregnancy can be made positive rather than negative if it can be dissociated from torture. If it represents a victory of will over body—or, more precisely, an act of will to give in to body—then it can be a source of celebration rather than terror.

If I am correct about this, then the torture prohibition suggests a new rationale, or at least a new explanation, for the abortion right. For what is abortion if not the assertion of will over body? The right to an abortion shifts the balance of power from the physical to the mental realm. Women who consider whether to have abortions decide whether to be pregnant, rather than simply allowing their bodies to dictate to them.⁸⁷ It follows, I think, that the most numerous beneficiaries of the

⁸⁶ See, for example, Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1, 30 (1988) (“[T]he radical argument—that pregnancy is a dangerous, psychically consuming, existentially intrusive, and physically invasive assault upon the body . . . best captures women’s own sense of the injury and danger of pregnancy.”).

⁸⁷ Some abortion opponents claim that this choice is made at an earlier stage, when the woman decides whether to have sexual intercourse. There are at least two problems with this claim. First, it assumes that all women who seek abortions have consented to sex in a normatively meaningful sense, which is not the case. Second, even if they have, it further assumes that engaging in a basic life activity should be treated as choosing a set of consequences that may, but need not, follow from the activity. Pedestrians on sidewalks do not consent to being run over by careless drivers. Why do people who have sex consent to pregnancy?

Still, some might argue, what about the decision to have *unprotected* sex? Why should women not be held to the choice that they make when they decide whether to use (or to insist that their partners use) contraception? One problem with this argument is that it takes no account of situations where contraception fails or where women are misled or pressured into unprotected sex. These women have never made the requisite choice, so they, at least, should be entitled to access to abortion. But as a practical matter, there is no way for legal institutions to separate these cases from cases where a choice has been made, so it is necessary to provide general access to the procedure. Moreover, the argument is premised on the assumption that, having had one chance to assert mental control over the body, people should not be given another. But this view is quite implausible when applied to other contexts. Few people suppose that someone who joins Al Qaeda thereby assumes the risk that he will be tortured if caught. Why, then, does someone who has unprotected sex assume the risk of pregnancy?

Putting these issues aside, though, the important point for present purposes is that people who oppose abortion on these grounds, like those who defend the practice, are doing so by asserting the primacy of mental choice over body.

abortion right are women who choose not to abort their pregnancies. The availability of the right, even if it is never utilized, changes the experience of pregnancy. It is then no longer like torture because it no longer reminds us that we are all body. Instead, a pregnancy that goes to term in the shadow of the abortion right represents a choice *by the mind* of body over mind. The availability of control, even if the control is never asserted, makes it possible to enjoy the loss of control.

Nothing I have said so far explains why this right to control takes precedence over the fetus's right to life. Instead, my observations are relevant only to the first step of a two-step argument for the abortion right. For constitutional purposes, it is first necessary to explain why the abortion liberty is more important than the kinds of liberties the state regularly limits, like the liberty to work for less than the minimum wage or to operate a motorcycle without a helmet. Even if this challenge is met (and I hope that it is by what I have said above), defenders of abortion must still confront the contention that the rights of the fetus outweigh the rights of the pregnant woman.

I do not pretend to have an argument that conclusively demonstrates how this weighing should come out. Still, the discussion above is relevant to the second stage of the argument as well as the first. Fetuses, after all, are all body. Whatever their potential for the future, they presently lack will. Put differently, they are already what torture turns people into. If we are serious in believing that torture is dehumanizing, then it must also be true that fetuses lack at least some of the qualities of full human beings.⁸⁸

It remains for abortion opponents to argue that fetuses have the potential to become human beings. Whether that potential is sufficient to justify limitations on the abortion right is much contested. My argument does not resolve that dispute, but it does at least change its character. It establishes why the abortion right is important and why the supposed rights of fetuses may be less important than they are sometimes thought to be.

B. Death and Assisted Suicide

If the previous argument is correct, the beginning of life, like torture, has the potential to remind us of the primacy of body over will. A similar process can occur at the end of life. Terminal disease, too, is relentlessly physical, painful, uncontrolled, and, for exactly these rea-

⁸⁸ For a well-known argument in favor of the abortion right along these lines, see Peter Singer, *Practical Ethics* 151 (Cambridge 2d ed 1993) ("My suggestion, then, is that we accord the life of a fetus no greater value than the life of a nonhuman animal at a similar level of rationality, self-consciousness, awareness, capacity to feel, etc.").

sons, terrifying. Like torture, serious disease can be deeply dehumanizing. It, too, reminds us that we are ultimately only body.

Just as the experience of childbirth can be transformed by the availability of abortion, so too the experience of death can be transformed by the availability of physician-assisted suicide. Here, too, the mere possibility of asserting mental control matters deeply, even if the control is never asserted.

Consider in this connection the Oregon experience with physician-assisted suicide. Apparently, many terminally ill patients who fill prescriptions for lethal medication never use the medicine.⁸⁹ They nonetheless appear to be comforted by its availability. The mere possibility of using the medicine, even if it is never used, creates a sense of control over a process marked by the progressive loss of control.⁹⁰ Of course, even under the best of circumstances, dying is not exactly enjoyable. Still, the Oregon experience suggests that it does not have to be dehumanizing in the way that torture is dehumanizing. We have the potential to be more at peace with the loss of control that is dying when we retain the illusion that we can take control.⁹¹

Interestingly, this argument suggests that physician-assisted suicide is most justifiable before the patient has reached the stage of excruciating pain—precisely the opposite of the common intuition.⁹² When the patient is in severe pain, opting for death is giving in to torture in the most literal sense. It is analogous to the decision of a political prisoner, subjected to unbearable pain, to betray her comrades. I do not mean to suggest, of course, that there should be a prohibition against

⁸⁹ See John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* 176–79 (Cambridge 2002) (summarizing the Oregon Health Division's reports on, among other data, the number of persons who received prescriptions for lethal drugs but did not use them). See also Sue Woodman, *Last Rights: The Struggle over the Right to Die* 87 (Plenum 1998) (reporting that, in the Netherlands, there is evidence that assisted death is requested three times more frequently than it is actually used).

⁹⁰ See Keown, *Euthanasia, Ethics and Public Policy* at 178 (cited in note 89) (reporting that, in interviews with family members of Oregon patients who died after using prescriptions for lethal drugs, fourteen of nineteen family members stated that the "patient was determined to control the circumstances of death").

⁹¹ I take this to be a central theme in Norman Mailer's great novel *The Executioner's Song* (Little, Brown 1979). The novel's anti-hero, condemned killer Gary Gilmore, manages to wrest control, or at least the illusion of control, of his own death from the state when he makes the choice not to appeal his conviction. Id. at 489–90, 509. Near the end of the novel, Gilmore appears to metaphorically "orchestrate" the firing squad as its bullets pierce his body, just as, in life, Gilmore had been a skilled thief, able to go "through everything like a guy leading an orchestra." Id. at 987. For a modern replay of the Gilmore drama, see William Yardley, *Even in Facing the Needle, a Killer Is Master of His Fate*, NY Times B5 (May 12, 2005) (reporting on convicted murderer Michael Ross's decision to end the appeals and hasten the execution of his death sentence).

⁹² Consider Keown, *Euthanasia, Ethics and Public Policy* at 180 (cited in note 89) (concluding that the "stereotypical case standardly presented by campaigners for [physician-assisted suicide], [that of] the cancer patient dying in agony, is in Oregon atypical").

people giving in to torture, or, by extension, that severe pain should disqualify a person from receiving lethal medication. We are doing no one a favor by making people put up with agony. But although people should have the right to relief from this sort of pain, their exercise of the right hardly represents a victory of mind over body. That victory can only be won at an earlier stage when the decision reflects real choice. It follows that the right to suicide is most significant when it is available to people who still have some control over their bodies.

The case for physician-assisted suicide is deeply controversial, but, significantly, the case against the practice is also rooted in ideas about mind, body, and choice. The Supreme Court has held that there is no general constitutional right to physician-assisted suicide, largely because of the fear, perhaps well grounded, that the suicide decision will result from the loss of, rather than the assertion of, control. A majority of the justices worried that if physician-assisted suicide is allowed, the real choice will be made by doctors, managed care bureaucrats, or relatives rather than by the patient.⁹³ If the Court is right, then the normative valence of the practice is reversed. Without resolving that dispute, it is sufficient for our purposes to note that it is a dispute about the underlying facts, rather than about the normative intuition that we need to ensure the dominance of mind over body.

C. Sex and Pornography

A third circumstance where body threatens to overwhelm will arise when people engage in various sexual practices. At the moment of climax, we are all body. In this sense, then, sex is like torture.

No doubt this claim will seem wildly off base, at least at first. For many people, sex—or at least some sex some of the time—is a source of great pleasure. Nonetheless, I want to insist that our powerful and deeply ambivalent reactions to sex are rooted in the same intuitions that make us cringe at torture.

Consider, first, pornography regulation. In our constitutional jurisprudence, obscenity is treated as a special case. Unlike other forms of speech, obscenity can be regulated and even banned in the absence

⁹³ See *Washington v. Glucksberg*, 521 US 702, 732 (1997) (recognizing “the real risk of subtle coercion and undue influence in end-of-life situations”); id at 738 (O’Connor concurring) (“[T]he risk that a dying patient’s request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide.”); id at 785 (Souter concurring) (expressing concern that “the barrier between assisted suicide and euthanasia could become porous, and the line between voluntary and involuntary euthanasia as well”). See also Keown, *Euthanasia, Ethics and Public Policy* at 180 (cited in note 89) (noting that, in Oregon, legalized physician-assisted suicide “could not unreasonably be said to be more a matter of the secret, unaccountable exercise of medical power than the open, regulated exercise of patients’ rights”).

of a showing of harmful effects.⁹⁴ There is a very substantial literature that attacks, defends, or explains this special treatment. For present purposes, the most important contribution to this literature is an article written a quarter century ago by Frederick Schauer.⁹⁵ Schauer insisted that obscenity was different from ordinary speech because its effects were only physical and not mental. Even bad literature in some sense makes us think, but obscenity is just about masturbation. It followed, Schauer thought, that an obscene book is no more “speech” than a sex tool and no more entitled to special constitutional protection.⁹⁶

The connection between this argument and the case against torture should be obvious. When we read an obscene book, we are giving in to our bodies in a fashion that is analogous to the reaction of a torture victim. Perhaps people should be allowed to give in, but this sort of surrender has nothing to do with the special place that mental activities hold in our constitutional culture. Because the consumption of ordinary literature requires mental activity, it connects us to what makes us human. In contrast, at least on this view, obscenity connects us to what we share with animals—the unwilling activity of our bodies.

One problem with Schauer’s argument—and with my reconstruction of it—is that it draws much too sharp a line. The Supreme Court’s embarrassing and futile effort to separate regulable obscenity from ordinary literature demonstrates just how hard it is to maintain this line.⁹⁷ Oddly, though, there is a sense in which this line-drawing problem actually strengthens my reconstruction of Schauer’s argument. This is so because the line-drawing problem derives from the same uncertainty about the domains of mind and body that worry us in the context of torture.

⁹⁴ See *Paris Adult Theatre I v Slaton*, 413 US 49, 58–60 (1973) (holding that the government need not demonstrate that obscenity has a material adverse effect in order to regulate it).

⁹⁵ Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”*: An Exercise in the Interpretation of Constitutional Language, 67 *Georgetown L.J.* 899 (1979).

⁹⁶ *Id.* at 922–23.

⁹⁷ Compare *Miller v California*, 413 US 15, 26 (1973) (discussing the Court’s own case law attempting to manage the difficulties in defining obscenity and stating that “[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection”), with *Paris Adult Theatre I*, 413 US at 83 (Brennan dissenting):

Any effort to draw a constitutionally acceptable boundary on state power [to regulate obscenity] must resort to such indefinite concepts as “prurient interest,” “patent offensiveness,” “serious literary value,” and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them.

See also Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 *Mich. L. Rev.* 1564, 1579 (1988) (“It is not logical to retain the view that the literary (or political, or scientific) merit discerned by a select few can salvage what to the vast majority of Americans merely seems to be evidence of sexual debasement.”).

On the one hand, nonobscene literature can also appeal to the body. The sense of fear one gets from reading a horror story is, after all, not that different from the sense of sexual arousal that comes from reading obscenity. On the other hand, the physical reaction to obscenity is achieved through mental processes. The creation of a fantasy world—including a sexual fantasy world—is quintessentially a mental activity. And, more generally, if the materialists are right, the quest for a dividing line between mind and body is fundamentally misguided.

Of course, this is only a special case of a more general difficulty. Recall that it is the very instability of the line between mind and body that plays a crucial role in the argument against torture. Just as torture reminds us of something we do not want to know, so too does obscenity. In both cases, the practice brings to our attention our sheer physicality, which has nothing to do with the love, altruism, or empathic connections that we like to pretend are central to our identities. Torture is dangerous because the insight it leads us to cannot easily be contained, and obscenity is dangerous in just the same way. Because the line between obscenity that appeals to the body and literature that appeals to the mind is unstable, we risk the realization that all the emotions supposedly generated by cognitive activity are ultimately physical.⁹⁸

Of course, this cannot be the whole story. We are fearful of sex, but we also celebrate it. This ambivalence is perfectly captured by the Supreme Court's contradictory treatment of sex. On the one hand, the obscenity cases suggest that sex—or at least sex unconnected to mental activity or emotional attachment—is entitled to less constitutional protection than comparable activities. On the other, the Supreme Court's recent decision invalidating state sodomy statutes⁹⁹ makes clear that sex is sometimes entitled to special constitutional protection, even when it is casual, unloving, and transitory.

⁹⁸ Consider in this regard the famous decision by the Seventh Circuit in *American Booksellers Association v Hudnut*, 771 F2d 323 (7th Cir 1985). Indianapolis enacted a statute regulating pornography on the ground that it adversely affected attitudes toward women not through rational persuasion but through unconscious and unwilling socialization. Writing for the court, Judge Easterbrook accepted these empirical assertions *arguendo*, but nonetheless struck down the ordinance on First Amendment grounds:

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit government regulation, that would be the end of freedom of speech.

Id. at 330.

⁹⁹ See *Lawrence v Texas*, 539 US 558 (2003).

Indeed it is striking that the Court has upheld the right to engage in homosexual sodomy unaccompanied by any sort of emotional or legal commitment, yet has so far declined to hold that people have the right to form, and gain legal recognition for, such commitments.¹⁰⁰

So is sex specially protected or specially suspect? Legal confusion on this score, I think, is grounded in the connection between physical release and mental control. Uncontrolled physicality is attractive to us, but only when it is linked to background cognitive control. The great trouble with—and great attraction to—sex is that it is always verging on spinning out of control.

Some of the fear is about other people. Just as we worry that a right to die will be transformed into a right to kill, so too we worry that a right to sex can be transformed into a right to rape.¹⁰¹ In truth, though, many of us are also afraid of ourselves. Sex releases deep forces within us that, we know, may not be subject to conscious control. It is just this flirting with uncontrollable danger that makes sex exciting and enjoyable. But we want to flirt with it, not succumb to it. Like children who enjoy terrifying roller coasters and haunted houses so long as they remain within the comforting, make-believe confines of an amusement park, many of us enjoy the loss of control that is sex only so long as the loss is neither real nor permanent. Sexual release must therefore be enveloped by pervasive control that makes the release an illusion rather than a reality.

This fear of ourselves, as well as of others, again connects sex to torture. Most discussion of torture appropriately focuses on its victims, but perhaps we should pay some attention to the torturer as well.¹⁰² Could it be that we fear torture not just because it dehumanizes its victims but also because we are terrified by the kind of torturer who loses control? On some deep level, perhaps we fear that we too might find ourselves wielding the whip in a pre-human, quasi-sexual frenzy unless we rigidly control the impulse to do so.

CONCLUSION:

SOME TROUBLING SECOND THOUGHTS

So that is what is so bad about torture. Or, at least, that is the best I can do to explain what is bad about torture. Still, I must confess that I remain troubled about whether the explanation makes torture bad

¹⁰⁰ Nothing in the Court's *Lawrence* opinion suggested that the right it articulated depended upon the existence of a long-term or committed relationship. On the other hand, the majority went out of its way to emphasize that it left open "whether the government must give formal recognition to any relationships that homosexual persons seek to enter." *Id.* at 578.

¹⁰¹ See Marc Spindelman, *Surviving Lawrence v. Texas*, 102 Mich. L. Rev. 1615, 1633–36 (2004).

¹⁰² For an admirable attempt to do so, see generally Conroy, *Unspeakable Acts* (cited in note 5).

enough. The problem with torture's truth is that, just maybe, it really is true.

We can see torture's truth through the eyes of both the torturer and his victim. Consider first the torturer. I have written above about the crazed, sadistic torturer acting out of prerational rage. We might imagine a very different sort of torturer, however. There is also the cool, unemotional, controlled, and bureaucratic torturer who tortures only because rational cost-benefit analysis proves that it is the right thing to do. The bureaucratic torturer understands that he is faced with a tragic choice. In no sense does he enjoy the pain that he inflicts. However, through heroic mental control, he can overcome his nonrational revulsion and get his body to behave.

Not coincidentally, it is the second kind of torturer that torture's apologists want to defend. This is the torturer who has dutifully secured his torture warrant and carefully studied the utilitarian calculus. Yet for me, at least, the bureaucratic torturer is much worse than the crazed torturer. The crazed torturer is at least in touch with something that is real and true about all of us. Oddly, it is his very anger, irrationality, and physicality that makes him seem more human. The bureaucratic torturer has won the battle of mind over body. In doing so, he has given up on a truth that shields us from savagery.¹⁰³

Nor is it just the crazed torturer who is in touch with something true. Jean Améry did not want to know what he learned as the blows fell, but that does not make what he learned any less true.¹⁰⁴ Indeed, it is horrible precisely because it is true. Maintaining an illusion that we are not all body is a luxury that the overprivileged can afford to indulge. For us, torture's truth is a fleeting threat, easily repressed most of the time. But it is not just torture's victims who lack this luxury. Consider, for example, people without enough food to eat, without shelter or sustenance, much less books and intellectual pursuits. The dispossessed must expend all of their energy meeting their physical needs. For them, the preeminent place of physicality is a daily fact they cannot escape. Indeed, it defines their lives. And when we think about the reality that there are millions and millions of these people, one has to wonder: what is so bad about torture then?

One might, of course, take an optimistic view. Perhaps the fight against torture is the first installment in a general campaign in favor of

¹⁰³ For the most well-known argument along these lines, see generally Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* 287–90 (Viking revised ed 1964). Explaining her phrase “the banality of evil,” Arendt argues that Adolf Eichmann “merely, to put the matter colloquially, never realized what he was doing It was sheer thoughtlessness . . . that predisposed him to become one of the greatest criminals of [the Nazi] period.” Id at 287–88.

¹⁰⁴ See text accompanying note 78.

mind over body—a struggle that would ultimately provide relief for the dispossessed as well. One wonders, though, whether this is a broader struggle that we really want to wage. An alternative possibility is that it is our modern squeamishness about our own bodies—our disgust with ourselves—that stands in the way of moral progress.¹⁰⁵ Consider, for example, the possibility that the reluctance of the privileged to come to terms with their own physicality serves to distance them from the dispossessed.¹⁰⁶ Precisely because the poor seem to be within the grip of overwhelming physical need, they strike the rich as less human and, so, less worthy of concern. More subtly, we may push them aside because their physicality reminds us of our own—the very fact about our existence that we wish to deny. And it takes little imagination to see the way in which the same sort of denial is at work in discrimination against other vulnerable groups, like the disabled and elderly.

Of course, it would be bizarre to suggest that the endorsement of torture is a first step in a program of moral inclusiveness. Still, if the impulses I describe are indeed at work, it is far from clear that condemnation of torture is a step toward universal empathy.

Perhaps, then, we need to confront torture's terrifying truth rather than simply condemn the torturer. We need to understand torture and all that it tells us about ourselves, rather than simply outlaw it. We need, in short, to talk about torture. Whether we can have this conversation while also hanging on to our humanity remains to be seen.

¹⁰⁵ Consider, in this regard, Martha Nussbaum's view:

Because disgust embodies a shrinking from contamination that is associated with the human desire to be nonanimal, it is frequently hooked up with various forms of shady social practice, in which the discomfort people feel over the fact of having an animal body is projected outwards onto vulnerable people and groups. These reactions are irrational, in the normative sense, both because they embody an aspiration to be a kind of being that one is not, and because, in the process of pursuing that aspiration, they target others for gross harms.

Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* 74–75 (Princeton 2004).

¹⁰⁶ On the relationship between disgust and the maintenance of social hierarchy, see William Ian Miller, *The Anatomy of Disgust* 8–9 (Harvard 1997). Miller nonetheless argues that disgust can reinforce opposition to cruelty when one is disgusted by the perpetrator of cruelty. *Id.* at 195–96. Still, a “second disgust,” focusing on the degraded victim of that cruelty, inhibits the “desire to relieve the suffering of the victim.” *Id.* at 196. But see Nussbaum, *Hiding from Humanity* at 84 (cited in note 105) (“[Miller offers no] argument that cruelty always disgusts. Such argument would be difficult to produce in light of the evidence he himself cites concerning the pleasure societies take in inflicting cruel forms of subordination on powerless people and groups”).